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18 *MOSTCAP ENTERPRISES CORP.*

19
20
21 FEDERAL TRADE COMMISSION,
22 et al.,

23 Plaintiffs,

24 v.

25 GREEN EQUITABLE SOLUTIONS,
26 et al.,

27 Defendants.

28 MICHAEL ROBIN NABATI,

Crossclaim Plaintiff,

Case No.: 2:22-cv-6499-FLA-MARx

**DEFENDANT MICHAEL ROBIN
NABATI'S OPPOSITION TO
PLAINTIFFS' MOTION TO
STRIKE AFFIRMATIVE
DEFENSES AND CROSSCLAIMS
(ECF 145)**

Hearing Date: March 24, 2023
Time: 1:30 PM
Place: Courtroom 6B

1 v.

2 DOMINIC AHIGA, ROGER SCOTT
3 DYER, ELENY MAGANA, BIANCA
4 VASQUEZ, AND ROES 1
5 THROUGH 10, INCLUSIVE, et al.,

6 Crossclaim Defendants.
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I. INTRODUCTION

Defendant Michael Robin Nabati (“Nabati”) and Relief Defendant MostCap Enterprises Corp. (collectively, “Defendants”) oppose in part Plaintiffs’ motion to strike affirmative defenses numbered 2-9, 11-13, and 15 and Nabati’s crossclaims for equitable indemnity and violation of Penal Code §§ 632 and 637.2 (ECF 145).

First, Defendants oppose Plaintiffs’ request to strike affirmative defenses 2-4 and 15 (estoppel, laches, waiver, and unclean hands) because, as Plaintiff concedes, these are recognized affirmative defenses to government enforcement actions that can be proven at trial. Motions to strike affirmative defenses should be denied unless the “questions of law are clear and settled, and ... under no circumstances could the defense prevail.” *FTC v. Lights of Am. Inc.*, No. SACV 10-1333 JVS (MLGx), 2011 WL 13308569, at *1 (C.D. Cal. Apr. 29, 2011) (citing *Fed. Deposit Ins. Corp. v. Main Hurdman*, 655 F. Supp. 259, 263 (E.D. Cal. 1987)). Moreover, it would be improper to strike these defenses based upon a supposed lack of factual specificity in the pleadings, because the specific facts constituting alleged investigative delay and misconduct are uniquely within Plaintiffs’ control and must be obtained through discovery. See, e.g., *FTC v. Golden Empire Mortg., Inc.*, No. CV 09-3227 CAS (RCX), 2009 WL 4798874, at *3 (C.D. Cal. Dec. 10, 2009) (denying motion to strike estoppel, waiver, and other equitable affirmative defenses, over FTC’s objection of lack of specificity, because “the legal merit of all of these arguments is better addressed on a motion for summary judgment”).

Second, Defendants oppose Plaintiffs' request to strike affirmative defenses 5 and 9 (reasonable value, value/setoff). District courts have refused to strike affirmative defenses for setoff of consumer value in FTC enforcement actions. *See, e.g., Lights of Am. Inc.*, 2011 WL 13308569, at *4; *FTC v. Bronson Partners*, No. 3:04CV1866(SRU), 2006 WL 197357, at *2 (D. Conn. Jan. 25, 2006). Defendants' answer sufficiently pleads that consumers received value from at least some of the transactions at issue and that this value can be offset against a potential award of

1 disgorgement or other relief awarded to Plaintiffs. Thus, Plaintiffs have not met
 2 their burden of showing that “under no circumstances could the defense prevail.”
 3 *Main Hurdman*, 655 F. Supp. at 263 (E.D. Cal. 1987).

4 Third, Defendants do not oppose Plaintiffs’ request to strike affirmative
 5 defenses 6, 7, and 11 (acts of third parties, no causation, no joint and several
 6 liability) on grounds that these doctrines are defenses to liability, and not
 7 affirmative defenses. Defendants expressly preserve their right to raise these
 8 arguments as defenses to liability.

9 Fourth, Defendants do not oppose Plaintiffs’ request to strike affirmative
 10 defenses 8, 12, and 13 (no equitable remedies; standing/authority; failure to join
 11 necessary/indispensable parties).

12 Finally, Nabati opposes Plaintiffs’ request to strike Nabati’s crossclaims for
 13 violations of the California Penal Code and equitable indemnity. Plaintiffs do not
 14 cite any binding authority or explain why Nabati’s claims under California Penal
 15 Code §§ 632 and 637.2 cannot be raised in this action. Plaintiffs merely argue that
 16 because the alleged recording occurred after Plaintiffs filed their original
 17 complaint, the unlawful recording claims cannot possibly be brought in this action.
 18 However, there is no rule that a crossclaim must arise before an action is filed to
 19 be asserted. Similarly, Plaintiffs do not cite any controlling precedent that
 20 categorically forbids equitable indemnity crossclaims among co-defendants in
 21 regulatory enforcement cases. The handful of cases cited by Plaintiffs denied
 22 indemnity claims on prudential grounds, and not based on any statutory or judicial
 23 authority prohibiting such claims. Nabati respectfully requests that the Court at
 24 least defer ruling on this claim until evidence can be developed and the facts
 25 underlying the indemnity claim can be more fully presented at trial or in opposition
 26 to a motion for summary judgment.

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1 **II. PROCEDURAL BACKGROUND**

2 On or about September 12, 2022, Plaintiffs filed their original Complaint in
 3 this action against Defendants Green Equitable Solutions, South West Consulting
 4 Enterprises, Inc., Apex Consulting & Associates Inc., Infocom Entertainment LTD,
 5 Inc., Dominic Ahiga, and Roger Scott Dyer. Plaintiffs allege that these named
 6 parties engaged in unlawful and deceptive practices in the marketing and sale of
 7 mortgage assistance relief services in violation of the FTC Act, the MARS Rule
 8 (Regulation O), the TSR, and the CCPA, and the CCFPL. ECF 1.

9 On or about October 28, 2022, Plaintiffs filed their First Amended Complaint
 10 naming Nabati as a defendant in the action. ECF 43

11 Defendants filed an answer and crossclaims on January 5, 2023. ECF 107.
 12 Defendants asserted fifteen affirmative defenses and Nabati asserted two
 13 crossclaims. Two of Nabati's cross defendants are individual defendants already
 14 named in Plaintiffs' complaint, and two of the cross defendants are individuals who
 15 were not previously named. First, Nabati alleges that he is entitled to equitable
 16 indemnity by the individual cross defendants based on their exclusive control over
 17 the legal entities responsible for the business activities giving rise to Plaintiffs'
 18 action. Second, Nabati alleges that he is entitled to civil penalties against the
 19 individual defendants for illegally recording a telephone call with Nabati regarding
 20 the mortgage assistance relief services at issue in this action, in violation of
 21 California Penal Code §§ 632 and 637.2.

22 On February 1 and 3, 2023, Defendants' former counsel moved to withdraw
 23 their representation. ECF 133, 139. On February 6-8, 2023, undersigned counsel
 24 entered appearances on Nabati's and MostCap's behalf. ECF 140-141, 143-144.

25 **III. LEGAL STANDARD**

26 Motions to strike affirmative defenses pursuant to Fed. R. Civ. P. 12(f) are
 27 "viewed with disfavor." *FTC v. Lights of Am. Inc.*, No. SACV 10-1333 JVS
 28 (MLGX), 2011 WL 13308569, at *1 (C.D. Cal. Apr. 29, 2011) (citing *Fed. Deposit*

1 *Ins. Corp. v. Main Hurdman*, 655 F. Supp. 259, 263 (E.D. Cal. 1987)); *see also RDF*
 2 *Media Ltd. v. Fox Broad. Co.*, 372 F. Supp. 2d 556, 566 (C.D. Cal. 2005) (“Motions
 3 to strike are generally disfavored because of the limited importance of pleadings in
 4 federal practice and because it is usually used as a delaying tactic.”). Such a motion
 5 should be denied unless the “questions of law are clear and settled, and ... under no
 6 circumstances could the defense prevail.” *Lights of Am. Inc.*, 2011 WL 13308569,
 7 at *1 (quoting *Main Hurdman*, 655 F. Supp. at 263); *see also Brewer v. Indymac*
 8 *Bank*, 609 F. Supp. 2d 1104, 1113 (E.D. Cal. 2009) (“A motion to strike should not
 9 be granted unless it is absolutely clear that the matter to be stricken could have no
 10 possible bearing on the litigation.”). A motion to strike cannot “be granted where
 11 resolution is dependent upon disputed questions of fact.” *Lights of Am. Inc.*, 2011
 12 WL 13308569, at *1 (quoting *Main Hurdman*, 655 F. Supp. at 263).

13 IV. ARGUMENT

14 A. Affirmative Defenses 2-4 And 15 Are Legally Viable And Should Not Be 15 Stricken.

16 In their motion, Plaintiffs concede that courts have recognized the existence
 17 of affirmative defenses for estoppel, waiver, laches, and unclean hands in
 18 government enforcement actions. *See Mot.* at 15:4-20:8. Plaintiffs argue, however,
 19 that Defendants have not specifically pled that the government engaged in the sort
 20 of “egregious and prejudicial affirmative misconduct” necessary to sustain these
 21 defenses at trial. While this might be a valid argument at trial or summary judgment,
 22 Defendants need not prove their case at the pleadings stage in order to plead these
 23 affirmative defenses.

24 Courts are split on whether the *Iqbal* and *Twombly* pleading standards also
 25 apply to affirmative defenses. *Roland Corp. v. Inmusicbrands, Inc.*, No. 2:16-cv-
 26 06256-CBM-AJWx, 2017 WL 513924, at *1 (C.D. Cal. Jan. 26, 2017); *Davis v.*
 27 *Hollywood & Ivar, LLC*, No. 221CV01235VAPJPRX, 2021 WL 4816823, at *2
 28 (C.D. Cal. Aug. 30, 2021). The Ninth Circuit has stated that “[t]he key to

1 determining the sufficiency of pleading an affirmative defense is whether it gives
2 plaintiff fair notice of the defense.” *Simmons v. Navajo Cty., Ariz.*, 609 F.3d 1011,
3 1023 (9th Cir. 2010).

4 Defendants respectfully contend that their affirmative defenses for estoppel,
5 waiver, laches, and unclean hands are sufficiently pled to put Plaintiffs on notice of
6 the defense for purposes of taking discovery and prosecuting this action. Defendants
7 need only provide a plain statement of the nature and grounds of each affirmative
8 defense; they need not plead “enough facts to state a claim to relief that is plausible
9 on its face,” as required by *Twombly*. See, e.g., *FTC v. Vemma Nutrition Co.*, No.
10 CV-15-01578-PHX-JJT, 2016 WL 3548762, at *1 (D. Ariz. June 30, 2016) (ruling
11 that defendants gave fair notice of affirmative defenses to FTC enforcement action);
12 *FTC v. Golden Empire Mortg., Inc.*, No. CV 09-3227 CAS (RCX), 2009 WL
13 4798874, at *3 (C.D. Cal. Dec. 10, 2009) (denying in full motion to strike
14 affirmative defenses despite FTC’s argument that defenses were too vaguely pled:
15 “the legal merit of all of these arguments is better addressed on a motion for
16 summary judgment”).

17 It is particularly unfair to hold Defendants to a high pleading standard for
18 these affirmative defenses for two reasons. First, Defendants *must* assert these
19 defenses in their initial answer in order to assert them at trial. Fed. R. Civ. P. 8(a)
20 & (c); see *Corbin v. Time Warner Entm’t-Advance/Newhouse P’ship*, 821 F.3d
21 1069, 1079 (9th Cir. 2016) (“If a party seeks to assert an affirmative defense, the
22 party ‘must affirmatively state’ that defense in a responsive pleading.”); *In re*
23 *Adbox, Inc.*, 488 F.3d 836, 841 (9th Cir. 2007) (a defendant’s failure to raise an
24 “affirmative defense” in his answer effects a waiver of that defense). Second, due
25 to the confidential nature of Plaintiffs’ investigations, the defenses of estoppel,
26 laches, waiver, and unclean hands often can only be articulated after discovery into
27 the agencies’ investigations and conduct surrounding the charges at issue.
28 Defendants should not be forced to plead affirmative defenses with factual

1 specificity before they have had an opportunity to obtain the discovery necessary to
2 develop those specific facts. *See, e.g., FTC v. Directv, Inc.*, No. 15-CV-01129-HSG,
3 2015 WL 9268119, at *3 (N.D. Cal. Dec. 21, 2015) (denying motion to strike
4 estoppel, waiver, and laches defenses: “The ultimate question of whether DirecTV
5 can prove the elements of [the defenses] is not the issue at this stage. The FTC has
6 notice of DirecTV’s legal theory, and the answer adequately pleads facts which
7 plausibly could support a finding in DirecTV’s favor. … ”).

8 If the Court nonetheless finds that any of the affirmative defenses pled in
9 Defendants’ answer are not factually specific enough to put Plaintiffs on notice of
10 the defense, Defendants request leave to amend their pleadings and attempt to
11 supply the requisite detail. *See Wyshak v. City Nat’l Bank*, 607 F.2d 824, 826-827
12 (9th Cir. 1979) (courts should freely grant leave to amend an affirmative defense
13 absent prejudice to the opposing party); *Venma Nutrition Co.*, 2016 WL 3548762,
14 at *1 (granting leave to amend affirmative defenses in FTC action).

15 **B. Affirmative Defenses 5 And 9 Are Legally Viable And Should Not Be
16 Stricken.**

17 In affirmative defenses 5 and 9, Defendants allege that they had no
18 knowledge of the allegedly unlawful mortgage assistance practices and that if they
19 received any funds traceable to the unlawful acts or practices of other parties, they
20 should be allowed to retain said funds. Alternatively, Defendants allege that any
21 liability they may have to Plaintiffs should be offset by the value of services or other
22 consideration that Defendants provided to the affected consumers.

23 Plaintiffs cite no binding precedent holding that these defenses for reasonable
24 value and setoff cannot be asserted in civil enforcement actions. *See Mot.* at 12:17-
25 13:21. In fact, several courts have explicitly refused to strike affirmative defenses
26 for setoff of consumer value in FTC enforcement actions. *See FTC v. Lights of Am.
Inc.*, No. SACV 10-1333 JVS (MLGx), 2011 WL 13308569, at *1 (C.D. Cal. Apr.
27 29, 2011); *FTC v. Bronson Partners*, No. 3:04CV1866(SRU), 2006 WL 197357, at

1 *2 (D. Conn. Jan. 25, 2006); *FTC v. Affiliate Strategies, Inc.*, No. 09-4104-JAR,
2 2010 WL 11470103, at *13 (D. Kan. June 8, 2010).

3 Therefore, the Court should not strike affirmative defenses 5 or 9. Plaintiffs
4 have not met their burden of showing that “under no circumstances could the
5 defense[s] prevail.” *Main Hurdman*, 655 F. Supp. at 263 (E.D. Cal. 1987).

6 **C. Nabati’s Crossclaims Are Legally Viable And Should Not Be Stricken.**

7 Crossclaims may be asserted against a co-defendant when the claim, *inter*
8 *alia*, “arises out of the transaction or occurrence that is the subject matter of the
9 original action.” Fed. R. Civ. P. 13(g). Courts have long given crossclaims a “liberal
10 and broad construction” when determining if they arise out of the same transaction
11 or occurrence as the initial pleadings. *In re Smith*, 52 B.R. 792, 795 (Bankr. E.D.
12 Cal. 1985); *see, e.g., Pochiro v. Prudential Ins. Co. of America*, 827 F.2d 1246,
13 1250 (9th Cir. 1987); *Magna Pictures Corp. v. Paramount Pictures Corp.*, 265 F.
14 Supp. 144, 152-153 (C.D. Cal. 1967).

15 Pursuant to this broad scope for permissible crossclaims, Nabati asserted two
16 crossclaims against two individual co-defendants and two individual third parties,
17 for (1) violation of California statutes prohibiting non-consensual recording of
18 telephone calls, and (2) equitable contribution.

19 Plaintiffs ask the Court to strike these crossclaims on two grounds. First,
20 Plaintiffs argue that the alleged telephone recording occurred after Plaintiffs
21 initiated this lawsuit, and the violation therefore is too attenuated to be included as
22 a crossclaim. Second, Plaintiffs argue that courts have disallowed defendants in civil
23 enforcement actions from filing indemnity crossclaims against one another for
24 prudential reasons. For the following reasons, neither argument commands that the
25 Court must strike Defendants’ crossclaims here.

26 ***California Penal Code § 362 and 637.2.*** Plaintiffs do not cite any binding
27 authority or explain why Nabati’s claims under California Penal Code §§ 632 and
28 637.2 cannot be raised in this action. Plaintiffs merely argue that because the alleged

1 recording occurred after Plaintiffs filed their original complaint, the unlawful
2 recording claim cannot possibly be brought in this action. However, there is no rule
3 that a crossclaim must arise before an action is filed to be asserted. Nabati's
4 unlawful recording claim arises from the same "transaction or occurrence that is the
5 subject matter of the original action" as Plaintiffs' complaint, which is all that is
6 required by Rule 13(g). Nabati alleges that the cross defendants recorded a call with
7 Nabati specifically to scapegoat Nabati "regarding various matters related to
8 Crossclaim Defendants' mortgage assistance relief services and other matters
9 related to the allegations in Plaintiffs' First Amended Complaint." *See Answer ¶19.*
10 Accordingly, the crossdefendants' alleged liability specifically arises from the same
11 "transaction or occurrence" (mortgage assistance relief services) that form the basis
12 of Plaintiffs' complaint.

13 ***Equitable Indemnity.*** Under California law, joint tortfeasors who are jointly
14 liable for a plaintiff's injury may bring claims against one another for equitable
15 indemnity. *Tesoro Ref. & Mktg. Co. LLC v. City of Long Beach*, 334 F.Supp.3d
16 1031, 1049 (C.D. Cal. 2017). Although equitable indemnity claims generally
17 require a judgment or other fixed obligation among joint tortfeasors to the plaintiff,
18 cross-claims may be asserted among co-defendants during the pendency of
19 litigation. *See, e.g., NuCal Foods, Inc. v. Quality Egg LLC*, 918 F. Supp. 2d 1037,
20 1042 (E.D. Cal. 2013) (concluding that "equitable indemnity claims may be pled in
21 a cross-complaint before any defendant has been found liable" to the plaintiff).

22 Plaintiffs claim that there is an "unbroken line of cases" stating that Rule
23 19(a) joinder rules cannot be invoked in an enforcement proceeding brought by an
24 administrative agency. Mot. at 17:1-15. This argument is irrelevant. Nabati is not
25 arguing that Plaintiffs' case must be dismissed under Rule 12(b)(7) for failure to
26 join a party under Rule 19. Rather, Nabati is asserting a common law claim against
27 individual co-defendants for equitable indemnity of any liabilities to Plaintiffs that

1 are, in fact, the fault of the cross-defendants. There is no “unbroken line of cases”
2 holding that this crossclaim is categorically impermissible.

3 Plaintiffs also cite a trio of unreported district court cases that supposedly
4 established a rule where defendants in regulatory enforcement actions cannot
5 crossclaim against other defendants for indemnity. Mot. at 27:16-28:2. There is no
6 such established rule. Two of Plaintiffs’ citations involved district courts, in their
7 discretion, refusing to allow Rule 14(a) impleader of third-party defendants in FTC
8 enforcement actions. *See FTC v. Adept Mgmt., Inc.*, No. 1:16-CV-00720-CL, 2017
9 WL 1055959, at *3 (D. Or. Mar. 20, 2017) (in a 30-defendant case, “[w]hile it
10 cannot be said that the [] defendants’ potential third-party claims against [an
11 attorney] are unrelated to the present action, asserting those claims at this juncture,
12 in this case, would disadvantage the proceeding”); *FTC v. Sw. Sunsites, Inc.*, No.
13 CV 87-6312-WMB, 1988 WL 94519, at *4 (C.D. Cal. Apr. 5, 1988) (dismissing
14 contractual indemnity claims filed in FTC enforcement action on ripeness grounds
15 because no breach of the contract containing indemnification provision had yet
16 occurred). The third case similarly involved a court dismissing equitable indemnity
17 claims on prudential grounds and not based upon any controlling statute or
18 precedent. *FTC v. Hang-Ups Art Enterprises, Inc.*, No. CV 95-0027 RMT(JGX),
19 1995 WL 914179, at *2 (C.D. Cal. Sept. 27, 1995) (expressing opinion that enabling
20 defendants in civil enforcement actions to claim for equitable indemnity would
21 hinder FTC’s ability to obtain consent orders).

22 Based on the lack of binding precedent foreclosing crossclaims for equitable
23 indemnity in civil enforcement actions, Nabati respectfully asks that the Court deny
24 Plaintiffs’ motion to strike the equitable indemnity crossclaim. Alternatively,
25 Nabati asks that the Court at least defer ruling on this issue until evidence can be
26 developed and the facts underlying Nabati’s indemnity claim can be more fully
27 presented on summary judgment.

28

1 **V. CONCLUSION**

2 For the foregoing reasons, Defendant Michael Robin Nabati and Relief
3 Defendant MostCap Enterprises Corp. respectfully ask that the Court DENY
4 Plaintiff's motion to strike affirmative defenses 2-5, 9, and 15, and DENY
5 Plaintiffs' motion to strike Defendants' crossclaims. In the alternative, and only if
6 the Court is prepared to strike the foregoing defenses and crossclaims, Defendants
7 request leave to amend their complaint to cure any pleading deficiencies that may
8 exist.

9 Defendants do not oppose Plaintiffs' motion to strike affirmative defenses 6-
10 8, and 11-13.

11
12 DATED: March 3, 2023

Respectfully submitted,

13 THE FREEDMAN FIRM PC

14
15 By: /s/Michael G. Freedman
16 Michael G. Freedman

17
18 LAW OFFICE OF SARA AZARI, APC

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24 *ROBIN NABATI and Relief Defendant*
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